

Creditors' Rights & Bankruptcy Section Newsletter

Greetings:

Happy Easter! This month's issue covers a hodge-podge of topics. First, we explore the impact of bankruptcy on structured settlement annuity payment streams – purchased or otherwise. Next, we discuss time impact of bankruptcy on domestic support obligations. Finally, we spend some time discussing the impact of reducing risk of liability for violations of the Food Safety Modernization Act, a hot topic in the produce industry these days. Our firm has handled matters in each of these and many other areas of the law involving creditor rights.

As always, let us know how we can assist you in your credit and collection needs. If you have any ideas for future article or questions that need addressing, give us a call.

[Bruce W. Akerly](#)
Chair, Creditors' Rights & Bankruptcy Practice Group
Cantey Hanger LLC, Dallas



[Bruce W. Akerly](#) leads the firm's Creditors' Rights & Bankruptcy Practice Group. He has extensive experience in commercial litigation, bankruptcy, financial restructuring, and creditors' rights.

Quote of the Month:

"Simplicity is the ultimate sophistication."

- Leonardo da Vinci

Self-Deprecating Lawyer Joke of the Month:

In a murder trial, the defense attorney was cross-examining the coroner: "Before you signed the death certificate, did you take the pulse, listen to the heart or check for breathing?" The coroner answered: "No." The defense attorney then asked the coroner: "So, when you signed the death certificate, you weren't sure the man was dead, were you?" The coroner responded with a straight face: "Well, the man's brain was in a jar on my desk, but I suppose he could have still been practicing law for a living." (A good lawyer never dies!)



What's On Your Mind?

If you have an issue or question you would like addressed in a subsequent e-newsletter, please let us know and we will attempt to do so.



The Impact of Bankruptcy on Structured Settlement Payment Streams

Authored by [Bruce W. Akerly](#), Partner

One of the frequently emphasized benefits of structured settlements involving acquired annuity payment streams is the protection afforded by bankruptcy. The protection flows both to the debtor/annuitant and to any purchaser of the annuitant's payment stream.

Because they do not own the annuity or have sold and/or assigned payments under an annuity, many debtors will not list, or forget to list, their annuity payment streams in bankruptcy. When a debtor files bankruptcy, the debtor is required to file a schedule of assets and liabilities. When preparing a schedule of assets for a bankruptcy filing, structure settlement payment rights must be properly and completely disclosed. This includes (a) all payments, whether guaranteed or life contingent, (b) near-term payments, and (c) payments that may not be due for many years.

Similarly, if an annuitant has sold all or part of the payment stream under the annuity, it is important that that transaction be disclosed, particularly if it happened within the statutory period for evaluating fraudulent transfers.

In most states, structured settlement payments are listed in Schedule B (personal property) and Schedule C (exempt property). A debtor must identify the payments as exempt to claim them as exempt, otherwise the chapter 7 trustee or creditors may seek to treat them as property of the bankruptcy estate.

If a debtor fails to identify structured settlement payments in his/her bankruptcy schedules, once discovered, the case may be re-opened to allow the trustee to administer the payments, notwithstanding the granting of a discharge in bankruptcy, and payments in the interim period may be required to be returned to the bankruptcy estate (including those payments that may have been acquired and assigned).

How structured settlement payments are valued in a debtor's schedules is part art and part valuation science. Schedules of assets, like structured settlement payments (whether exempt or not) must place a value on the asset. The value can be present value or future value. There are no hard and fast rules. A low value attributed to a payment stream that covers many years may raise questions. The bottom line is to make sure the debtor is aware of these issues and seek professional advice should the annuitant consider or decide filing for bankruptcy protection.

A structured settlement is a valuable asset to the debtor and is designed to protect the annuitant and, in the case of bankruptcy, it is important that the debtor/annuitant not do anything to jeopardize that protection.



The Impact of Bankruptcy on Domestic Support Obligations

Authored by [Bruce W. Akerly](#), Partner

It used to be that two things most certain were death and taxes. Unfortunately, in our society, divorce and bankruptcy may need to be added to the list. An important objective in any divorce proceeding is to secure support obligations. The most important objective of bankruptcy (at least from the debtor's perspective) is to obtain a discharge of financial obligations. With this in mind, what happens when an ex-spouse with support obligations files bankruptcy?

The Bankruptcy Code defines domestic support obligation as a debt that accrued on or after the bankruptcy is filed which is owed to or recoverable by a spouse, former spouse, or child of the debtor or such child's parent, legal guardian or responsible relative that is in the nature of a support obligation for such spouse, former spouse or child of the debtor, "without regard to whether such debt is expressly so designated." The obligation is typically evidenced by a separation agreement, divorce decree or property settlement agreement incident to the divorce.

Can a debt which constitutes alimony, maintenance, or support be discharged in bankruptcy? The answer depends on the intent of the parties as gleaned from the family court's orders and the agreements of the party's incident to the divorce proceedings. If the bankruptcy court determines it is not, the debt is dischargeable.

Bankruptcy courts have developed a non-exhaustive list of evidentiary factors to assist them in determining whether an obligation is truly in the nature of alimony, maintenance or support which includes:

- a. the parties' disparity in earning capacity;
- b. the relative business opportunities of the parties;
- c. the physical condition of the parties;
- d. the educational background of the parties;
- e. the probable future financial needs of the parties; and
- f. the benefits each party would have received had the marriage continued.

In determining the true nature of payments, bankruptcy courts have examined whether payments to provide alimony continue when the recipient dies or remarries and whether the obligation is to be paid in installments. If the obligation continues regardless of remarriage or death, courts often find that the debt is dischargeable. At least one court has also noted that where one spouse is awarded virtually all of the property and provides for periodic payments to that spouse, such payment must be in the nature of support.

Some recommendations in drafting the support provisions of the decree to support non-dischargeability of the obligation are 1) to reference the existence and importance of the factors related to non-dischargeability listed above as opposed to merely placing a simple declaration of non-dischargeability in the decree; 2) include a statement of intent as to whether the obligation is to provide for spousal support; and 3) when possible, terminate payments upon remarriage or death.

When the agreement reads more in the nature of a property settlement agreement as opposed to support, the language of the divorce decree may be important to provide the necessary protection. One option is to include conveyance language as to the property at issue so that once the divorce is granted the ex-spouse beneficiary remains noted as the legal owner of the interest. Another solution would be to include language which provides that any property remaining in the possession of an ex-spouse for the benefit of the other ex-spouse would be held in constructive trust and that although one spouse may possess funds for a short period of time, they never retain ownership rights to the funds. Finally, to preclude the impact of a bankruptcy proceeding, the ex-spouse should request that the other ex-spouse agree that he/she does not possess title to the distributions due to be made under the agreement and that those distributions do not constitute property of the bankruptcy estate.

While today divorce may be more certain than not, the uncertainty of the impact of bankruptcy on the obligations of one spouse owing to another can be avoided through proper planning and drafting. Planning and drafting to anticipate issues in the future can prevent difficult and expensive legal issues from arising at a later date.



Reducing the Risk of Liability for Alleged Violations of the Food Safety Modernization Act

Authored by [Bruce W. Akerly](#), Partner

Food safety is a front burner issue these days. Several years ago, the President signed into law the Food Safety Modernization Act (FSMA) which is described on the FDA's website as "the most sweeping reform of our food safety laws in more than 70 years" which "aims to ensure the U.S. food supply is safe by shifting the focus from responding to contamination to preventing it." Interpretation: the FSMA represents a major shift from deregulation to more enforcement authority at the federal level and impose more requirements on importers, processors and suppliers. The laudable goal of the FSMA is to protect the public. The impact of the FSMA is underway. A proactive approach in dealing with FSMA issues is a must. Fortunately, there are practical ways to reduce the risk of liability which may arise from perceived, threatened or actual claims are made under the FSMA relating to contaminated produce.

First, consider placing specific functions of your business devoted to receipt and distribution into restricted, stand alone and asset free entities such as LLPs and LLCs. Not only can these protect against personal liability for the ownership, they can hopefully shield other business assets and operations from the impact of liability imposed on a specific operation.

Second, in the event of a recall at whatever level, the seller should fully cooperate with all federal, state and local authorities. Do not escalate the problem by throwing up defensive shields. Remember, the focus is on preventing fallout and preservation of good will and market share.

Third, investigate the circumstances surrounding the recall or allegations of injury. Always keep accurate and adequate records of shipments. Maintain logs of all communications from suppliers and customers, as well as events leading up to and following allegations of contamination. Document complaints and report all alleged injuries immediately to appropriate authorities—whether claims are substantiated or not. Finally, promptly engage counsel for advice and to confirm the appropriate course of action. A good defense often starts with a good offense.

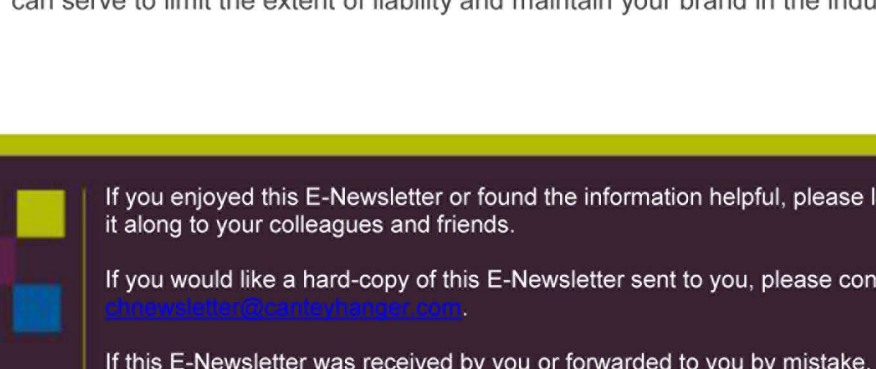
Fourth, do not ignore the media; however, given that litigation may ensue, all comments should be guard and general in nature – e.g., "we are aware of the situation and cooperating with appropriate authorities" and/or "we have and are taking all steps necessary to assure our customers that the produce they purchase is of the highest quality." Play the game under according to your own rules.

Fifth, institute a "litigation hold" on your employees. Make sure that no records, paper or electronic, are destroyed. Also, advise all employees not to speak to anyone about the factual circumstance. Establish a chain of authority within your organization for dealing with the situation at hand.

Sixth, review insurance coverage. If necessary obtain or maintain adequate insurance coverage for claims arising from allegations of food contamination and/or damages resulting therefrom.

Seventh, vet your suppliers. Carefully consider the source of produce and the quality credibility of suppliers. Consider including indemnification provisions in supplier agreements. If there is doubt about whether the supplier will have the economic wherewithal to satisfy indemnification responsibilities, consider asking them to back the provision with appropriate bonding or other insurance.

Produce is a fungible commodity. Any number of things can affect quality in the distribution chain. While it is next to impossible to insure against all liability relating to contaminated produce, a proactive approach to food safety issues can serve to limit the extent of liability and maintain your brand in the industry.



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